STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVIS ORTEGA,

Defendant-Appellant.

UNPUBLISHED
January 22, 1999

No. 202300
Ingham Circuit Court
LC No. 96-070854 FC

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of two counts of first-degree murder, one based on felony-murder and the other based on premeditation and deliberation, MCL 750.316; MSA 28.548. Defendant was sentenced to two concurrent terms of life imprisonment without the chance of parole. We affirm in part but remand for vacation of one of defendant's murder convictions.

Defendant first argues that the trial court erred when it refused to read the jury instruction for voluntary manslaughter. This Court reviews the record at trial to decide whether sufficient evidence existed to convict defendant of a cognate lesser included offense. *People v Sullivan*, 231 Mich App 510, 517; ___ NW2d ___ (1998). "If evidence has been presented that would support a conviction of a lesser included offense, it is error requiring reversal for the judge to refuse to give a requested instruction for that offense." *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *Sullivan, supra* at 517-518. In order to warrant issuing the instruction, "there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. Only then does the judge's failure to instruct on the lesser included offense constitute error." *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Voluntary manslaughter, which requires killing in the heat of passion caused by adequate provocation, and there was no lapse of time during which a reasonable person could control his passions, is a cognate lesser included offense of murder. *Id.* at 388; *Sullivan, supra* at 518.

Here, we find no evidence to support the provocation element of voluntary manslaughter or the element that requires that the defendant have an insufficient amount of time to cool off between the provocation and the killing. *Pouncey, supra*. The evidence revealed that the victim,

who employed and lived with defendant for several years, fired defendant between 2:15 p.m. and 2:45 p.m. on June 21, 1996, that defendant swore at the victim, and that defendant then left their house. Another witness testified that she took a call from the victim between 3:00 p.m. and 4:00 p.m. that day. Defendant's girlfriend testified that defendant arrived at her place, covered in blood splatters, before 4:00 p.m. that day. Defendant said he had been in a fight.

Defendant wants this Court to infer from the background relationship between the two men that losing his job would have provided adequate provocation for defendant to kill the victim. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason," and "the provocation must be adequate, namely, that which would cause the reasonable person to lose control." *Pouncy, supra* at 389. Evidence that defendant was fired and left the scene was not sufficient evidence to satisfy the provocation element of voluntary manslaughter because the evidence, including defendant's departure from the murder scene, does not support the conclusion that defendant was actually provoked; regardless, a reasonable person would not have lost control to the degree that he would have murdered someone with a hatchet.[1]

Moreover, while there is no set time period for cooling off, it must be a reasonable time. *Id.; People v Wofford*, 196 Mich App 275, 280; 492 NW2d 747 (1992), citing *Maher v People*, 10 Mich 212, 219 (1862). Defendant had at the very least, a minimum of fifteen minutes in which to cool off. Based on *Pouncey, supra*, this was a sufficient amount of time for reflection to justify the trial court's decision denying defendant's request for a voluntary manslaughter instruction. See generally *Sullivan, supra* at 518-520.

Defendant next argues that the trial court erred when it entered convictions for felony murder and first-degree premeditated murder based on a single killing. The Court in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), held that "dual convictions arising from the death of a single victim violate double jeopardy." *Id.* at 220-221. In *Bigelow, supra* at 221-222, this Court ordered the lower court to vacate one of the defendant's murder convictions that was entered in violation of the defendant's right against double jeopardy and to modify the judgment of sentence to "specify that defendant's conviction and single sentence is of one count of first-degree murder supported by two theories: premeditated murder and felony murder." *Id.* at 222. In the instant case, we agree that defendant's convictions for felony murder and first-degree murder for the victim's death violate defendant's right against double jeopardy. Accordingly, we remand this case to the trial court for vacation of one of the murder convictions and the amendment of defendant's judgment of sentence to reflect one first-degree murder conviction supported by two theories. *Id.*

Finally, defendant argues that he was deprived of a fair trial based on the prosecutor's reference in closing argument to statements that defendant gave during pre-arrest interviews in light of defendant's decision not to testify at trial. Because defendant did not object to the remark below, appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We conclude that the error, if any, could have been cured by an instruction, and the prosecutor's statements were innocuous at best, particularly given the trial court's instructions to the jury regarding arguments of counsel not constituting evidence. According, no miscarriage of justice would result.

We affirm in part, vacate defendant's conviction pursuant to *Bigelow*, *supra*, and remand for entry of a new judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] We also find that the evidence regarding defendant's actions after the crime, i.e., going on a shopping spree with the victim's checkbook, staying in the victim's home, boarding up the basement door to conceal the victim's body, and continuing to drive the victim's car, do not point to someone who lost control or who murdered the victim out of passion versus premeditation.